

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2111

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
WARREN GRAVES, :

Petitioner-Appellant, :

-against- :

ENNIS J. OLGIAI, Chairman of New :
York State Board of Parole, :

Respondent-Appellee.
-----X

BRIEF FOR APPELLEE

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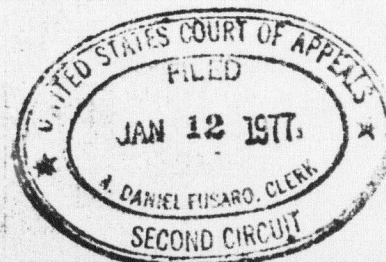


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York State Board of Parole, :
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BRIEF FOR RESPONDENT

Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (Port, J.) dated July 19, 1976 dismissing a civil rights complaint. The Court held that the action was barred by res judicata.

Question Presented

Is Appellant's claim that the Parole Board lacked the power to return him to a State Correctional Facility without merit, moot and barred by res judicata?

Prior Proceedings

The complaint and brief for appellant contain the following allegations: Following his conviction for burglary, appellant was released on parole. Thereafter he was arrested

for attempted rape. A parole violation warrant was issued and lodged against him. The warrant was lifted the day after the date of the original maximum expiration date of the sentence for the burglary conviction. Thereafter, he was convicted of the new charge. The parole authorities revised the maximum expiration date on the burglary conviction and lodged a parole violation warrant against him. Subsequently, he was sentenced on the new charge and returned to a State Correctional Facility. When he appeared before the Parole Board he was held to be seen again in two years.

Appellant contends that the parole authorities failed to provide him with a revocation hearing; that he could not be declared delinquent; that the parole violation warrant against him had been withdrawn and relodged against him after the new conviction; that he was found to be a parole violator after the first sentence had expired; and that he is entitled to an evidentiary hearing on his claim in the District Court.

ARGUMENT

APPELLANT'S CLAIM THAT THE
PAROLE BOARD LACKED THE POWER
TO RETURN HIM TO A STATE
CORRECTIONAL FACILITY IS WITHOUT
MERIT, MOOT, AND BARRED BY RES JUDICATA.

Apparently appellant endeavors to show that the Parole Board lacked the authority to return him to a State

Correctional Facility. The Parole Board acted in conformity with its statutory authority. When appellant violated the terms of his parole, the Parole Board declared him to be delinquent and the declaration of delinquency interrupted his sentence as of the date of the delinquency. The interruption continued until his return to an institution under the jurisdiction of the Department of Correction, Penal Law § 70.40(3)(a); People ex rel. Petite v. Follette, 24 NY 2d 60 (1969); United States ex rel. Spain v. Oswald, 342 F. Supp. 97 (E.D.N.Y. 1972); Pavia v. Parole Director State of New York, 365 F. Supp. 699, 700 (E.D.N.Y. 1973). A parole board may lodge a parole violation warrant against a parolee as a detainer and it has no duty to provide him with a hearing until he is taken into custody as a parole violator by execution of the warrant. Moody v. Daggett, ___ US ___ 45 USLW 4017 (November 15, 1976).

In any case appellant could be and was returned to prison by virtue of his conviction for the crime committed while on parole. The validity of his being held in the custody of the Superintendent by virtue of the new sentence is not challenged on this appeal. The issue as to the validity of the Parole Board's power is moot. See e.g. Armstrong v. Ward, 529 F. 2d 1132, 1135 (2d Cir. 1976); Lunz v. Preiser, 524 F. 2d 289 (2d Cir. 1975); Monell v. Department of Social Services of City of New York, 532 F.

2d 259 (2d Cir. 1976); Lecci v. Cah., 493 F. 2d 826, 829 (2d Cir. 1974). Moreover, appellant alleges that the Parole Board changed the maximum expiration date of the first sentence to May 23, 1976. Also he alleges that the complaint was filed on May 27, 1976. The first sentence had been fully satisfied when the complaint was filed, and again the claim as to the Parole Board's alleged lack of authority is moot. See Carafas v. La Vallee, 391 U.S. 234, 238 (1968). See also Sibron v. New York, 392 U.S. 40, 57 (1968); United States v. Loschiavo, 531 F. 2d 659, 662 (2d Cir. 1976); Shepard v. United States Board of Parole, 541 F. 2d 322, 323 (2d Cir. 1976).

Moreover, the action is barred by res judicata. In a prior Article 78 proceeding, appellant claimed that he had a constitutional right to be released on parole. As the District Court noted, the State Court dismissed the proceeding on the merits. The constitutional claim was already decided and appellant is not allowed to relitigate the issue. Lombard v. Board of Education, 502 F. 2d 631, 636-637 (2d Cir. 1972); cert. den. 420 U.S. 1976; Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974), cert. den. 419 U.S. 1093; Lackawanna Police Benevolent Association v. Balen, 446 F. 2d 52 (2d Cir. 1971).

CONCLUSION

THE ORDER APPEALED FROM
SHOULD BE AFFIRMED.

Dated: New York, New York
December 18, 1976

Respectfully submitted,

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